

COMMONWEALTH OF KENTUCKY  
MINE SAFETY REVIEW COMMISSION  
ADMINISTRATIVE ACTION NO. **08-MSRC-266**

**CARLOS BRANDON ASHER**

PETITIONER

**FINAL ORDER**

COMMONWEALTH OF KENTUCKY,  
OFFICE OF MINE SAFETY AND LICENSING

RESPONDENT

\* \* \* \* \*

This matter having come before the Commission on the Joint Motion to Approve Settlement Agreement between the Respondent, Office of Mine Safety and Licensing (OMSL) and Petitioner as Certificate holder and the members of the Mine Safety Review Commission (Commission) having reviewed the Settlement Agreement filed on or before December 11, 2008 and of record in the matter herein, and the Commissioners being sufficiently advised,

IT IS HEREBY **ORDERED** as follows:

1. The Joint Motion to Approve Settlement Agreement is **GRANTED**;
2. Any formal hearing and pre-hearing conference scheduled and other pre-hearing orders are **CANCELLED**;
3. The **Settlement Agreement** signed by the parties and filed with the Commission is hereby **incorporated by reference** as if reproduced herein in full as a material part of this **FINAL ORDER**. A copy is attached hereto;

4. The obligation for compliance with the **submittal of drug test** results to OMSL for reinstatement and other terms if provided in the Settlement Agreement is the **sole responsibility of the Certificate holder** and shall not be delegated to any other person. The Certificate holder shall submit drug tests as **required whether or not he is employed** in coal mining. Failure of or refusal to submit drug testing or other terms in the Settlement Agreement may result in permanent revocation of all certificates by the Commission upon a Motion for Sanctions by OMSL.
5. Failure by the Certificate holder to submit the pre-reinstatement drug test to the Mining Board or other failure to complete the reinstatement process for any reason within ninety (90) days of this Order shall result in revocation for not less than one (1) year from the date of this Order without the necessity of further action or motion by OMSL.
6. This Final Order only resolves the matters referenced herein, and any new enforcement action or subsequent penalties imposed during any probationary period are in addition to and not in lieu of those that may be sought by OMSL for the acts or omissions during that probationary period. This Final Order in no way prohibits OMSL from investigating or filing legal action based upon other activities or omissions by the Certificate holder not arising from the factual basis of the original violation and resolved herein.

7. This Final Order shall be considered to constitute a “first offense” as that term is defined in 805 KAR 8:010, Section 1(5). Future allegations of separate offenses by the Certificate holder, resulting in an adjudication of guilt by the Commission, shall be deemed “subsequent offenses” as defined by 805 KAR 8:010, Section 1(13).
8. This Final Order represents a final disposition of all issues between the Complainant and the Certificate holder, in these matters. Failure to comply with the terms and conditions of this Final Order may result in further action by the Commission; and
9. Appellate rights: Pursuant to KRS 351.194(8) and KRS 13B.140(1), an appeal of an order of the Commission must be filed in the Franklin Circuit Court within thirty (30) days of the entry of this Final Order. The petition shall include the names and addresses of all parties of record in this proceeding and shall include a statement of the grounds upon which review is requested. A copy of this Final Order shall accompany the petition. Copies of the petition must be served upon the Commission and all parties of record in this proceeding.

Entered this the 11<sup>TH</sup> day of December 2008.

A handwritten signature in black ink, appearing to read 'Denise Moore Davidson', is written over a horizontal line.

Denise Moore Davidson, Chair  
MINE SAFETY REVIEW COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINAL ORDER was served by certified mail, return receipt requested, and by regular mail, postage pre-paid to the following this 18<sup>th</sup> day of December 2008:

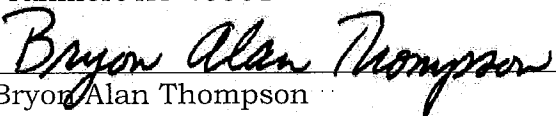
CARLOS BRANDON ASHER  
P.O. BOX 1590  
HYDEN, KY 41749

And by messenger mail to:

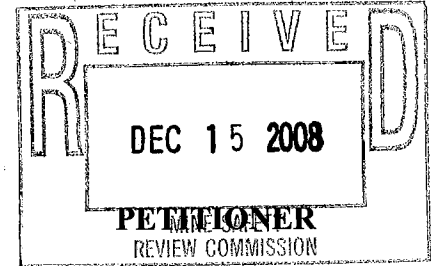
Staff Attorney for OMSL  
Office of General Counsel  
#2 Hudson Hollow  
Frankfort, Kentucky 40601  
(502) 564-2356  
FAX: (502) 564-9212

And the original shall be kept on file:

Mine Safety Review Commission  
132 Brighton Park Blvd.  
Frankfort KY 40601

  
Bryon Alan Thompson  
Hearing Officer & General Counsel  
Mine Safety Review Commission

**COMMONWEALTH OF KENTUCKY  
MINE SAFETY REVIEW COMMISSION  
Action No. 08-MSRC-266**



**CARLOS B. ASHER**

**v.**

**SETTLEMENT AGREEMENT**

**KENTUCKY OFFICE OF MINE  
SAFETY & LICENSING**

**RESPONDENT**

\* \* \* \* \*

Come the parties, Petitioner Carlos B. Asher (Asher), by counsel, and the Respondent, the Kentucky Office of Mine Safety and Licensing (OMSL), by counsel, and hereby state that they have agreed to a settlement of the above-styled disciplinary proceeding, according to the following terms:

In consideration for the final resolution of this action against him, and the cancellation of the hearing (as it pertains to him) that was scheduled for December 11, 2008, the Petitioner hereby admits that he violated his employer's substance abuse policy, which was reported to the Respondent and resulted in the suspension of his temporary surface miner and underground miner certificates on October 30, 2008. His actions constituted a violation of KRS 351.120. Therefore, Asher hereby agrees to the following:

1. The suspension of his temporary surface miner and underground miner certificates until such time as his application for restoration of his certificates is accepted by the Kentucky Mining Board (Board), in accordance with KRS 351.120(13), but in no event shall the suspension end sooner than sixty (60) days after the next scheduled meeting of the Board.

2. The Petitioner's temporary surface miner and underground miner certificates shall be suspended for a period of sixty (60) days following reinstatement by the Board. Thereafter, said certificates shall be placed in probation for a period of one (1) year, subject to the conditions set forth in Paragraphs 3, 4, 5, 6, and 7, below.

3. During the suspension and probationary period set forth in Paragraph No. 2 above, Asher shall comply with all state and federal mine safety laws and regulations, including the terms of this Settlement Agreement. The willful violation by Asher of any of said laws or regulations, or the terms of this settlement agreement, may result in OMSL filing a motion with the Mine Safety Review Commission to revoke his certificates for the remainder of the probationary period or to permanently revoke them.

4. Asher shall submit to drug testing twice per month every month during the first four (4) months of the suspension and probationary period set forth in Paragraph Nos. 1 and 2, above, and once every thirty (30) days during the remainder of the period. The twice-monthly tests shall be taken on or before the 15<sup>th</sup> day of each month and on or before the last day of each month and the reports of results made as soon as possible. In all instances, it is the Petitioner's responsibility to have the results of all tests reported to OMSL, at his own expense, through his employer's program or a treatment program. If necessary, the Petitioner can utilize the drug testing program offered by OMSL through its examination system, at his own expense.

5. Asher understands and agrees that he shall undergo an evaluation by a certified addiction counselor or other professional familiar with addictive behaviors, to determine if attendance in rehabilitation, counseling or support group programs is warranted prior to the reinstatement of his certificates. The written determination of said professional shall be submitted to OMSL. If the professional determination concludes that the Petitioner should enroll

in rehabilitation, counseling or support group programs, he shall do so prior to the reinstatement and shall continue his participation in same during the probationary period or until such time as his counselors certify to OMSL that he has completed the treatment and counseling.

6. Asher understands and agrees that the report of any positive drug test results shall be cause for the permanent revocation of his certificate. During the probationary period set out herein, if the Petitioner is reported by any employer for violating the employer's drug- and alcohol-free policy pursuant to KRS 351.170(2), the parties agree that the Petitioner's mining certifications will be immediately suspended until such time as a Motion for Sanctions can be filed by the OMSL and ruled upon by the MSRC.


7. Asher further understands and agrees that he shall not be eligible for certification in any other specialties during the probationary period.

8. Asher understands and agrees that in the event that he fails to provide the documents necessary for reinstatement (letter of application, negative drug screen and drug evaluation) before the Kentucky Mining Board within ninety (90) days of entry of the Final Order upholding the Settlement Agreement, his certificate will be automatically revoked for a period of not less than one (1) year without the necessity of further Motion or action by the OMSL.

Asher further agrees that this Settlement Agreement and any final order issued herein by the Mine Safety Review Commission will be considered by the Commission to constitute a "first offense", as that term is defined at 805 KAR 8:010, Section 1(5).

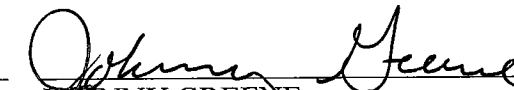
Asher states that he has carefully read this Settlement Agreement (or that the Settlement Agreement has been read to him); that he has carefully considered the Agreement prior to signing it; and, that he understands and agrees to its terms and provisions.

OMSL and Asher acknowledge and agree that there are no further promises, inducements, representations, or agreements in connection with this Settlement Agreement other than those expressly set forth in writing herein.

  
CARLOS B. ASHER  
202 Serenity Drive  
P.O. Box 1590  
Hyden, Kentucky 41749-1590

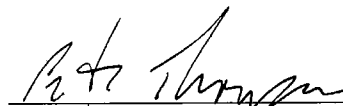
DATE

12/11/08

  
JOHNNY GREENE  
Executive Director  
KY Office of Mine Safety & Licensing  
P.O. Box 2244  
Frankfort, Kentucky 40602

DATE

12-12-08

  
PETE THOMPSON  
Office of General Counsel  
Office of Mine Safety & Licensing  
2 Hudson Hollow  
Frankfort, Kentucky 40601  
Telephone: 502/564-2356  
Facsimile: 502/564-9212

### CERTIFICATE OF SERVICE

This is to certify that of the foregoing Settlement Agreement was served upon the following by mailing, postage prepaid, a true and correct copy of same on this the 12<sup>th</sup> day of DECEMBER, 2008 to:

Mr. Carlos B. Asher  
202 Serenity Drive  
P.O. Box 1590  
Hyden, Kentucky 41749-1590

  
PETE THOMPSON